



February 4, 2019

Via <https://foiaonline.regulations.gov>

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: Freedom of Information Act Request – Documents Related to Clean Water Act permits for the Northmet Mine in Minnesota

Dear National Freedom of Information Officer:

On behalf of Friends of the Boundary Waters Wilderness, we hereby request access to the records described below pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the pertinent Environmental Protection Agency (“EPA” or “Agency”) regulations, 40 C.F.R § 2.100 *et seq.*

Definitions applicable to this request:

“Northmet Mine” shall refer to the proposed copper-nickel-platinum mine in northeastern Minnesota to be owned and operated by Polymet Mining Corporation.

“EPA” shall refer to the United States Environmental Protection Agency, and any individual acting as an agent on its behalf.

“Polymet” shall refer to the Polymet Mining Corporation, a Canadian company, and any individual acting as an agent on its behalf.

“Army Corps” shall refer to the United States Army Corps of Engineers, and any individual acting as an agent on its behalf.

“MPCA” shall refer to the Minnesota Pollution Control Agency, and any individual acting as an agent on its behalf.

“NPDES” shall refer to the National Pollutant Discharge Elimination System.

“Communications” shall refer to electronic mail and all associated attachments, letters, faxes, calendar appointments, in-person meetings, phone calls, text messages, or any other correspondence.

“Records” includes correspondence, minutes of meetings and a list of participants for those meetings, daily agendas and calendars, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored), and includes materials that the agency has either created or obtained.

Description of Records Sought:

This FOIA request seeks:

- (1) All communications and records reflecting EPA’s opinion on the proposed and final NPDES permit for the Northmet Mine.
- (2) All communications and records reflecting EPA’s opinion on the proposed and final Section 404 permit for the Northmet Mine.

This request seeks only memoranda, notes, or other records that reflect EPA’s opinion on the Clean Water Act permits. Preliminary drafts of memoranda and letters are included in this request.

Be advised that, in particular, final memoranda and records are not exempt from disclosure under the deliberative process privilege, as “the public is vitally concerned” with reasons supplied by EPA for the policy positions it adopted on the Clean Water Act permits for the proposed Northmet mine. *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975). We are concerned by recent reports that EPA withheld letters and memoranda from the administrative record that critiqued the NPDES permit issued by MPCA on the Northmet Mine. *Inside EPA*, “Retired EPA Attorney Says Region 5 Chief Withheld NPDES Permit Criticism,” January 31, 2019. These opinions, letters, and memoranda are exactly the type of “secret law” that Congress sought to shed light on, and should be produced. *Sears, Roebuck & Co.*, 421 U.S. at 156 (requiring production of internal memoranda explaining NLRB’s decision not to file a complaint). To the extent that any document is withheld, we ask that the response to this request be segregated and that all final memoranda and records be provided immediately.

We request these documents in electronic form if possible, but hard copies would also be acceptable. If a response is posted on FOIAonline, we request prompt notification by email at jparekh@earthjustice.org, jbrimmer@earthjustice.org that responsive documents have been posted.

This request seeks responsive records in the possession, custody, or control of any EPA office, including, but not limited to EPA Region 5.

In the event that any requested document is claimed, or continues to be claimed, exempt from disclosure or review, or otherwise withheld, we request an index or log of documents withheld, with the maximum possible identifying information that you can provide, including a description of the document withheld, its date, its location, its recipient(s) and the specific reason(s) the document is being withheld. 5 U.S.C. § 552(b). We further request that EPA make

all information requested publicly available on its website. 5 U.S.C. § 552(a)(2)(D)(i)(II); *see also* Freedom of Information Act; Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 26, 2009) (“All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.”).

Request for a Fee Waiver

We respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l)(1).

FOIA mandates that agencies waive or reduce search and copying fees where the disclosure is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

In addition to the statutory direction, EPA has issued regulations outlining factors that it considers in deciding whether a fee waiver is warranted: (1) the request concerns the operations or activities of government; (2) the disclosure likely will contribute to understanding of government operations or activities; (3) the disclosure will contribute significantly to the public’s understanding; and (4) the disclosure is not primarily in the requester’s commercial interest. *See* 40 C.F.R. § 2.107(l)(1)-(3).

As one court explained, if a non-profit organization has “identified why they wanted the administrative record, what they intended to do with it, to whom they planned on distributing it, and the [relevant] expertise of their membership,” then a waiver is appropriate. *Ctr. for Biological Diversity v. Office of Mgmt. & Budget*, 546 F. Supp. 2d 722, 727 (N.D. Cal. 2008) (internal quotation omitted). The information provided below demonstrates that the requesting groups meet the required criteria and are entitled to a full fee waiver.

The Friends of the Boundary Waters Wilderness is dedicated to protection of the Boundary Waters region – a place where individuals can experience wild lakes and rivers and seek adventure, beauty, rejuvenation and solitude. Following the 1978 wilderness designation, the Friends emerged as a leading voice for the ongoing protection, preservation and restoration of the Boundary Waters Canoe Area Wilderness (BWCAW). In recent years, the Friends’ core work has focused on defending the BWCAW against activities that erode its wilderness character. Currently, a major focus of the organization is to prevent proposed sulfide mining projects from negatively impacting area waters, cultural resources, and human use and enjoyment of the region. The Friends also dedicates time and resources to preserving recreation resources within the wilderness, building conservation capacity in communities surrounding the BWCAW and fostering the next generation of wilderness enthusiasts through volunteer and youth engagement programs.

The proposed Northmet Mine is a highly controversial copper sulfide mine that would destroy hundreds of acres of wetlands in northeastern Minnesota, and will release hazardous contaminants including mercury into surface and ground waters. During the environmental review

for this project, agencies received more than 90,000 public comments—indicating the high level of public involvement and attention to this issue. During the environmental review for this project, Friends of the Boundary Waters participated in comments with other environmental organizations and they have continued to engage experts and to provide information and comment to state and federal agencies engaged in examining and permitting the mine. Contaminated waters from this project will flow into the Partridge River, and ultimately the St. Louis River, and Lake Superior, which serve as drinking water for millions of people. Contaminated ground water may also seep into the Boundary Waters Canoe Area Wilderness. Daylighting information herein requested will contribute greatly to public understanding of the operations of EPA on this important public policy matter.

Friends of the Boundary Waters Wilderness and the groups they collaborate with, disseminate information about the proposed Northmet Mine and the associated adverse impacts to wetlands and waters of the United States through newsletters, web sites, action alerts, press releases, social media, and collaboration with others. They will evaluate the records disclosed and share them. These groups have the expertise and experience to evaluate this information and disseminate it appropriately. *See Friends of the Coast Fork v. United States Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997); *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1041 (D. Idaho 2004) (noting cases holding “statements of intent to disseminate requested information through newsletters, popular news outlets, and presentations to public interest groups, government agencies, and the general public sufficient to entitle an organization to a fee waiver”). Friends of the Boundary Waters Wilderness is eminently qualified and able to analyze the requested records and disseminate the information on this important issue to the public.

Finally, Friends of the Boundary Waters Wilderness is a non-profit organization that has no commercial interest in the requested records. *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (noting that FOIA’s fee waiver provision is to be “liberally construed in favor of waivers for noncommercial requestors” (quoting legislative history)). Their sole interest in obtaining the records is to analyze the information, incorporate it into educational materials and advocacy to EPA and other governmental entities, and disseminate the information along with their analysis to the public. Accordingly, Friends of the Boundary Waters Wilderness are entitled to a fee waiver. *See* 40 C.F.R. § 2.107(l)(1)-(3).

Please do not hesitate to call me to clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at (206) 343-7340 ext. 1044. As provided by FOIA, 5 U.S.C. § 552(a)(6)(A), we look forward to a reply within twenty working days. Thank you in advance for your assistance.

Sincerely,

Jaimini Parekh
Janette Brimmer
Attorneys for
Portland Harbor Community Coalition